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No. 06 - 97

In the
Supreme Court of the United States
October Term, 2006

STOLT-NIELSEN S.A. *et al.*,
Petitioners,
v.
UNITED STATES,
Respondent.

On Petition for Writ of *Certiorari*
to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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MOTION OF *AMICUS CURIAE* NEW ENGLAND LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

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Pursuant to Supreme Court Rule 37.2, counsel for *Amicus Curiae* has attempted to secure written consent for the filing of the attached *Amicus Curiae* Brief from counsel for the Petitioner and Respondent. Counsel for Petitioner granted such consent and its assent accompanies this motion and brief. Although counsel for *Amicus* requested assent from counsel for Respondent on August 15, 2006, counsel for Respondent has yet to inform counsel for *Amicus* of respondent's position on the filing of the attached *Amicus Curiae* Brief. Accordingly, counsel for *Amicus Curiae* hereby moves this Court for leave to file the Brief *Amicus Curiae* which is submitted herewith. *Amicus* makes this motion on the following grounds:

NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations, primarily from New England.

NELF's members are affected by the business climate in New England, which depends, in part, upon a fair balance in the regulation of the free market by the government. Heavy-handed prosecutions of corporations can unfairly harm employees uninvolved in alleged wrongdoing, innocent investors, and entire sectors of the economy. Because of the highly regulated nature of the modern economy, the business community is concerned that, unless reasonable standards are adopted concerning the conditions that must be met before an indictment can be sought based on alleged violations of a nonprosecution agreement, premature and perhaps unwarranted indictment could bring down an entire company.

The absence of such standards hurts businesses and their employees in all sectors, in part because they increase risk and deter capital investment.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Rapanos v. United States*, 126 S. Ct. 2208 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 126 S. Ct. 1843 (2006); *Kelo v. City of New London*, 125 S. Ct. 2655 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Commissioner v. Banks*, 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

Of particular concern to NELF and its members in this case is that Stolt-Nielsen was first induced to disclose confidential information because of a signed nonprosecution agreement. Then, afterwards, based in part on the disclosed information, prosecutors sought to indict Stolt-Nielsen without first obtaining a determination that it had breached the agreement. Given the serious effects that the mere fact of an indictment can have on a business entity, if the decision below stands, businesses may now be less willing to cooperate with the government in regulatory investigations than before, to the detriment of both the business community and society as a whole.

Amicus Curiæ therefore believes that this brief provides an additional perspective, which may aid the Court in determining whether to grant the petition for a writ of *certiorari* of the petitioners, Stolt-Nielsen S.A. and Stolt-Nielsen

Transportation Group, Ltd. (collectively, "Stolt-Nielsen") and Richard B. Wingfield.

Wherefore, NELF respectfully requests that this Court grant *Amicus Curiae* leave to file the attached brief in support of the Petition for a Writ of *Certiorari*.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By its attorneys,

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Dated: August 21, 2006

QUESTION PRESENTED

Do the federal courts lack authority, under the Separation of Powers doctrine, to enjoin federal prosecutors from breaching a binding contractual obligation "not to bring any criminal prosecution" against a company and its executives?

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BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIÆ*

Amicus Curiæ New England Legal Foundation ("NELF") seeks to bring to the Court's attention its views, and the views of its supporters, concerning the potentially devastating effects on a business of a premature indictment.[1]

NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and

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1 Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that neither counsel for Petitioners nor Respondent authored this Brief in whole or in part and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief.

the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations, primarily from New England.

NELF's members are affected by the business climate in New England, which depends, in part, upon a fair balance in the regulation of the free market by the government. Heavy-handed prosecutions of corporations can unfairly harm employees uninvolved in alleged wrongdoing, innocent investors, and entire sectors of the economy. Because of the highly regulated nature of the modern economy, the business community is concerned that, unless reasonable standards are adopted concerning the conditions that must be met before an indictment can be sought based on alleged violations of a nonprosecution agreement, premature and perhaps unwarranted indictment could bring down an entire company. The absence of such standards hurts businesses and their employees in all sectors, in part because they increase risk and deter capital investment.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Rapanos v. United States*, 126 S. Ct. 2208 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 126 S. Ct. 1843 (2006); *Kelo v. City of New London*, 125 S. Ct. 2655 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Commissioner v. Banks*, 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363

(2000).

Of particular concern to NELF and its members in this case is that Stolt-Nielsen was first induced to disclose confidential information because of a signed nonprosecution agreement. Then, afterwards, based in part on the disclosed information, prosecutors sought to indict Stolt-Nielsen without first obtaining a determination that it had breached the agreement. Given the serious effects that the mere fact of an indictment can have on a business entity,[2] if the decision below stands, businesses may now be less willing to cooperate with the government in regulatory investigations than before, to the detriment of both the business community and society as a whole.

Amicus Curiæ therefore believes that this brief provides an additional perspective, which may aid the Court in determining whether to grant the petition for a writ of *certiorari* of the petitioners, Stolt-Nielsen S.A. and Stolt-Nielsen Transportation Group, Ltd. (collectively, "Stolt-Nielsen") and Richard B. Wingfield. Pursuant to Supreme Court Rule 37.2 (b), counsel for *Amicus* has bound a motion for leave to file this Brief together with the Brief, as counsel for Respondent has not timely informed counsel for *Amicus* of Respondent's position on the filing of this Brief.

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2 Formally, any business entity granted the status of an artificial person under state or federal law—including corporations, limited liability companies, limited liability partnerships, and professional corporations, and banking national associations—may be prosecuted. Because the corporation is the most common form of business entity, references in this brief to "corporations" or "corporate" issues are intended as shorthand to include all such artificial persons.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case contained in the Brief of Petitioners.

SUMMARY OF ARGUMENT

This petition for *certiorari* deals with the steps necessary before the government can abrogate a nonprosecution agreement and indict a corporation. *Amicus* argues that, in light of Stolt-Nielsen's property interest in its nonprosecution agreement, the government cannot indict Stolt-Nielsen without first demonstrating that it violated the agreement. Strong public policy concerns militate against violating expectations and indicting a corporation for business crimes that are also covered by civil regulatory penalties after the corporation has disclosed privileged information pursuant to a nonprosecution agreement. Such indictments can rarely achieve public benefits that outweigh the adverse consequences for the company, its employees, its investors, its customers, and its sector of the economy, especially considering the minimal time cost of deferring indictment until a judicial determination whether the company violated the nonprosecution agreement.

ARGUMENT

I. Public policy concerns and the potentially serious adverse collateral effects on innocent stakeholders when a business is indicted warrant the minor inconvenience of requiring that the government first obtain a judicial determination that the corporation violated a nonprosecution agreement.

Amicus NELF supports the arguments made by Petitioners that Petitioners properly sought injunctive relief against the government's threatened indictment. Prosecutorial

discretion is not unlimited and may be abused. This Court has approved injunctions barring prosecutions that abuse that discretion in rare, but appropriate circumstances, such as to protect endangered property rights. *See Younger v. Harris*, 401 U.S. 37, 50 (1971); *Dombrowski v. Pfister*, 380 U.S. 479, 486–87 (1965) (permitting injunction against criminal prosecution); *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 98–99 (1949) ("[A] civil action will lie in exceptional circumstances that make an injunction necessary to effectually protect property rights."). *See also American Library Assn. v. Barr*, 956 F.2d 1178, 1188 (D.C. Cir. 1992) (discussing effects of *Younger* and *Dombrowski*); Petition at 14, 23–25.

In this case, Stolt-Nielsen obtained protected property rights by entering into the nonprosecution agreement with the government. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid."); *Lynch v. United States*, 292 U.S. 571, 579 (1934) ("The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States."). *See Cienega Gardens v. United States*, 331 F.3d 1319, 1329 (2003) ("[T]here is . . . ample precedent for acknowledging a property interest in contract rights under the Fifth Amendment."). The property interest at stake in Stolt-Nielsen's contractual right of freedom from prosecution (absent a violation of the agreement) protects the very the life of the company. *KPMG: Escaping Arthur Andersen's Fate*, J. Bus. Law Soc. (June 22, 2005), available at http://iblsjournal.typepad.com/illinois_business_law_soc/2005 06/kpmg_escaping_a.html ("The corporate world has already seen what an indictment of a major accounting firm can result

in and few are eager to repeat the results: lost jobs, investments, pensions, for individuals, and the destruction of a firm as clients fled in droves.").

Amicus submits that, because indictment alone can have devastating practical effects on a company, Stolt-Nielsen's property rights might be damaged irremediably by indictment without an initial determination that it had breached its nonprosecution agreement. Many commentators echo the refrain that indictment alone can severely harm or ruin a business. Michael G. Oxley, Address, *In the Wake of the Sarbanes-Oxley Act*, 31 Ohio No. U. L. Rev. 319, 322 (2005) ("I've never believed in a government-imposed death penalty through indictment of entire companies. I think that experience has proved that the approach [is] ultimately counterproductive."); Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 Am. Crim. L. Rev. 1095, 1097 (2006) ("[I]ndictment often amounts to a virtual death sentence for business entities . . . ."); *Government Takes Measures to Stop Companies from Paying the Legal Fees of Indicted Employees*, J. Bus. Law Soc. (April 18, 2006), available at http://iblsjournal.typepad.com/illinois_business_law_soc/2006/04/government_take.html ("According to Professor Ellen Podgor at Stetson University College of Law, 'if companies don't cooperate with the government, they can face a death penalty by being indicted.'"). *See* Petition at 11, 19.

The harmful effects from simple indictment can cause a downward spiral for businesses regardless of the ultimate result of the prosecution. These adverse effects of indictment include loss of confidence by customers, inability to attract potential investors, difficulty attracting high quality new employees, derivative issues raised by state regulators, filing of

private civil litigation, potential automatic debarment or exclusion from government programs, de-certification or downgrading by private listing and rating organizations, and devotion of significant corporate resources to fighting the charges. *See* Wray & Hur, 43 Am. Crim. L. Rev. at 1135 ("And in almost every instance, the prospect of costly follow-on civil litigation, both private (shareholder derivative suits, for example) and public (actions by increasingly aggressive state attorneys general) must be reckoned with as well."). The downfall of the company, in turn, results in adverse collateral consequences for completely innocent individuals associated with it.[3] Employees (the vast majority of whom are usually unaware of wrongdoing by a few) may lose their livelihoods

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3 The government recognizes the serious adverse effects of corporate prosecutions on innocent stakeholders, which it terms "collateral consequences." *See* Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys (Jan. 20, 2003), at § II, available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (commonly known as the "Thompson Memo") ("[C]ollateral consequences[] includ[e] disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution."). *Id.* at § IX ("In the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation's officers, directors, employees, and shareholders, many of whom may, depending on the size and nature (e.g., publicly vs. closely held) of the corporation and their role in its operations, have played no role in the criminal conduct, have been completely unaware of it, or have been wholly unable to prevent it. Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts or federal funded programs such as health care.").

and their pensions, while shareholders and bondholders (who have little control over day-to-day corporate affairs) may lose the value of their investments. *See KPMG: Escaping Arthur Andersen's Fate.* The failure of a significant business and the ripple effect on its stakeholders in turn can adversely affect an entire region or sector of the economy. *KPMG: Escaping Arthur Andersen's Fate* ("The implications of indicting a major . . . firm are clear: 'practical, economic, and social fallout' a former Justice Department official comments."). These concerns are relevant to every possible business-related crime, not just those in the antitrust field, but also in the areas of securities law, environmental law, tax, election law, and government contracts. Wray & Hur, 43 Am. Crim. L. Rev. at 1107. *See* Petition at 11. The issues raised in this case are, therefore, of significant concern to the entire business community.

The *Arthur Andersen* case, for example, arose in the securities field and clearly illustrates the harsh collateral effects of a criminal indictment of an entire business entity. *See Arthur Andersen LLP v. United States,* 544 U.S. 696 (2005). *See also* George Ellard, *Making the Silent Speak and the Informed Wary,* 42 Am. Crim. L. Rev. 985, 987–88 (2005) ("[A]s the demise of the accounting firm Arthur Andersen demonstrates, indictments can be lethal, even for venerable institutions. The 2002 indictment of that company and its subsequent conviction for obstruction of justice caused the 90-year old entity to implode."); Wray & Hur, 43 Am. Crim. L. Rev. at 1097 ("Th[e] conviction [of accounting firm Arthur Anderson] also effectively put the eighty-nine-year-old firm out of business and forced tens of thousands of people to find new jobs."); Andrew Ross Sorkin, *Quattrone May Avoid 3rd Trial,* New York Times (Aug. 19, 2006), at B1, 8 ("For many businesses, an indictment is an effective death knell, as it was for accounting

firm Arthur Andersen in 2002."); *KPMG: Escaping Arthur Andersen's Fate*, ("Andersen showed that an in[dict]ment of a corporation is practically a death sentence."). Although Arthur Andersen LLP was ultimately tried and convicted, in a decision eventually reversed by this Court because of improper jury instructions, *Arthur Andersen*, 544 U.S. 696, the company was ruined by the indictment long before the trial. Joseph A. Grundfest, *Over before It Started*, New York Times (Jun 14, 2005) ("Andersen was destroyed when it was indicted.... Andersen's demise did serve as a stern reminder to corporate America that prosecutors can bring down or cripple many of America's leading corporations simply by indicting them on sufficiently serious charges. No trial is necessary."). The total number of Arthur Andersen employees plummeted from 26,000 employees at the time of indictment to 10,000 by the time of the trial. David Roeder, *Andersen Gets Death Sentence*, Chicago Sun-Times (June 16, 2002). By time of this Court's decision in 2005, the company was liquidating its assets and counted only 200 employees, mostly processing legal claims. Greg Farrell, *Ruling on Anderson is too late*, Detroit Business News (June 5, 2005).

The serious adverse direct and collateral outcomes from business indictments provide powerful incentives to businesses to cooperate in criminal investigations in order to obtain protection from prosecution. Ellard, 42 Am. Crim. L. Rev. at 988 ("[T]he possibility of avoiding indictment creates a strong incentive for business organizations to cooperate in government investigations."); Wray & Hur, 43 Am. Crim. L. Rev. at 1104 (Nonprosecution "agreements ... allow the company to avoid any potential collateral consequences associated with the mere fact that the company has been charged with a crime...."); *id.* at 1138 ("[T]he collateral effects

of a corporate indictment might be disastrous . . . ."). While acceding to a nonprosecution agreement might entail some collateral harm to the company, an indictment would cause far greater injury.[4] These powerful incentives to settlement induced Stolt-Nielsen to sign the nonprosecution agreement and submit incriminating evidence to the government, which prosecutors now wish to use against Stolt-Nielsen. *See* Petition Appendix F (trial court opinion) at 48a–49a. In light of the evidence already turned over by Stolt-Nielsen in good faith, the consequences to it of the government's breaching its nonprosecution agreement and going forward with indictment would be especially devastating. This is particularly so when the trial court found that Stolt-Nielsen did not violate the agreement. *See* Petition Appendix F at 35a, 48a–49a.[5] In other

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4 *See* Wray & Hur, 43 Am. Crim. L. Rev. at 1104 ("Alternative resolutions [nonprosecution agreements and the potentially more serious deferred prosecution agreements], which are less punitive and entail reduced collateral harm, give prosecutors far more flexibility to strike the proper balance between punishing and deterring criminal conduct on the one hand and encouraging and rewarding voluntary disclosures and cooperation on the other."); *id.* at 1138 ("Although criminal prosecution of companies is relatively rare, the consequences for the unlucky few are so catastrophic that many companies under investigation have elected to maximize their chances of survival by providing prompt and authentic cooperation. They seek to ensure that the worst outcome that could befall them is a deferred prosecution, not indictment.").

5 In fact, Stolt-Nielsen received somewhat harsher treatment than the previous participants in Antitrust Amnesty Agreements, as those companies generally received a declination to prosecute altogether, rather than a nonprosecution agreement, which conditions the government's forbearance on the company's performance under the agreement. Wray & Hur, 43 Am. Crim. L. Rev. at 1155.

words, the government's proposed indictment of Stolt-Nielsen based on the alleged breach of the agreement was found to be factually unsupported.

In addition to the acknowledged adverse collateral effects of an unwarranted indictment, in this case Stolt-Nielsen would suffer the specific harms of unintended self-incrimination. The Seventh Circuit Court of Appeals precedents relied upon by Stolt-Nielsen, which require pre-indictment determinations in cases of alleged breach of a nonprosecution agreement, arose in the context of individual prosecutions. *See United States v. Meyer*, 157 F.3d 1067, 1076 (7th Cir. 1998) ("Absent exigent circumstances, an individual is entitled to a judicial determination of his breach before being deprived of his interest in the enforcement of an immunity agreement."); *United States v. Verrusio*, 803 F.2d 885, 889 (7th Cir. 1986) (pre-indictment determinations are "better procedure"). *See also* Petition at 13–16. In the business context, such as in this case, an indictment can have far more serious adverse collateral consequences on innocent stakeholders than would be the case in the prosecution of an individual. Therefore, substantive judicial review of alleged breaches of a nonprosecution agreement by a business before the government can proceed to indictment is even more vital than in the prosecution of an individual.

The position of the Court of Appeals for the Third Circuit below ignores not only the adverse collateral consequences of an indictment before a judicial determination whether a violation of a nonprosecution agreement occurred, it also contradicts sound public policy by encouraging overzealous prosecutions for little public benefit. The cost to the public would be minimal if this Court were to require a pre-indictment determination whether a potential criminal

defendant breached a nonprosecution agreement. *Meyer*, 157 F.3d at 1077 ("Since the government is required to obtain a judicial determination of a defendant's breach prior to trial, it is but a *de minimis* inconvenience for the government to secure that determination pre-indictment."). The adverse public policy consequences are significant. Not only can there be the serious adverse collateral consequences to innocent stakeholders discussed above, but the perception in the business community of unjust and overzealous prosecutors eager to overturn bargained-for nonprosecution agreements would actually deter cooperation with government investigations. *See* Wray & Hur, 43 Am. Crim. L. Rev. at 1144;[6] *id.* at 1171.[7] Courts have long

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6 If companies perceive the government as overly aggressive or unpredictable in its corporate charging decisions, and if prosecutors fail to give appropriate weight to the fact that companies self-report their misconduct, then companies may decide that the risk is simply not worth taking. In other words, if the government comes down too harshly on companies that self-report, word will spread throughout the business community and companies may stop self-reporting altogether.

Id. at 1144 (footnote omitted).

7 If companies perceive the government as overly aggressive or unpredictable in its corporate charging decisions, and if prosecutors fail to give appropriate weight to companies' self-reporting of misconduct, then companies may decide that the risk is simply not worth taking. If industry comes to view the possibility of a criminal conviction as only marginally less attractive than the certainty of harsh treatment at the hands of the government after self-

permitted limited review of prosecutorial discretion when constitutionally protected rights are at stake, such as Stolt-Nielsen's contractually based property rights in this case. Given the serious adverse collateral and public policy consequences of unjustified corporate indictments, absent exceptional circumstances not present in this case, these potential abuses of prosecutorial discretion warrant pre-indictment judicial review of alleged violations of corporate nonprosecution agreements.

> reporting its misconduct, then fewer and fewer companies will be willing to step forward, voluntarily disclose violations and cooperate with ensuing government investigations. Cooperation is only attractive, if it unmistakably helps, and helps a great deal.

Id. at 1171.

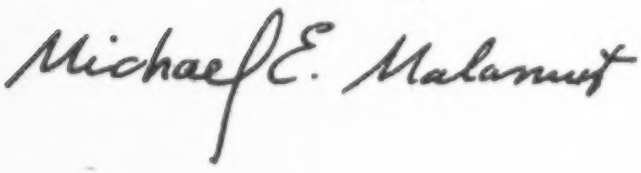
CONCLUSION

For the reasons stated above, this Court should grant the petition of Petitioners Stolt-Nielsen *et al.* for a writ of *certiorari*.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By its attorneys,



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